

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government: The bill creates a criminal offense for price gouging. The bill also requires the imposition of a ten year minimum mandatory sentence for the offense of aggravated white collar crime involving Medicaid fraud.

B. EFFECT OF PROPOSED CHANGES:

White Collar Crime Protection Act: Section 775.0844, F.S. defines the term "white collar crime" to mean the commission of any felony offense contained in specified chapters of statute¹. The section defines the term "aggravated white collar crime" as engaging in at least two white collar crimes that have the same or similar intents, results, accomplices, victims or methods of commission, or that are otherwise interrelated by distinguishing characteristics and are not isolated incidents. The section provides that a person who commits an aggravated white collar crime and victimizes either: 10 or more elderly persons or disabled adults; twenty or more persons; or any agency or subdivision of the State of Florida and obtains or attempts to obtain \$50,000 or more, commits a first degree felony.

HB 1675 adds section 409.920, relating to Medicaid provider fraud, to the list of enumerated offenses contained within the definition of "white collar crime". The bill also provides that a person who commits an aggravated white collar crime in which at least one of the white collar crimes committed is a violation of s. 409.920, relating to Medicaid provider fraud or is a white collar crime in which intent to defraud is an element and which, alone or in combination with another violation of s. 409.20 or a white collar crime in which intent to defraud is an element either victimizes 20 or more persons or victimizes the State of Florida, any state agency, any of the state's political subdivisions, or any agency of the state's political subdivisions commits a first degree felony. The offense is punishable by up to thirty years in prison and requires the imposition of a 10 year minimum mandatory sentence.

Price Gouging: Florida prohibits the rental or sale of essential commodities for unconscionable prices during a declared state of emergency.² A commodity is defined as any goods, services, materials, merchandise, supplies, equipment, resources, or other article of commerce which includes food, water, ice, chemicals, petroleum products, and lumber necessary for consumption or use as a direct result of the emergency.³ A price is unconscionable if there is a gross disparity between the price charged for the commodity and the average price of that commodity during the 30 days prior to a declaration of a state of emergency, with exceptions.⁴ A price is also unconscionable if the amount charged "grossly exceeds" the average price during the 30 days prior to a declaration of a state of emergency.⁵

¹ Included in the list are the following chapters: chapter 560 (relating to the Money Transmitters' Code), chapter 812 (relating to theft, robbery, and related crimes), chapter 815 (relating to computer-related crimes), chapter 817 (relating to fraudulent practices), chapter 825 (relating to abuse, neglect, and exploitation of elderly persons and disabled adults), chapter 831 (relating to forgery and counterfeiting), chapter 832 (relating to the issuance of worthless checks and drafts), chapter 838 (relating to bribery and misuse of public office), chapter 839 (relating to offenses by public officers and employees), chapter 895 (relating to offenses concerning racketeering and illegal debts) or chapter 896 (relating to offenses related to financial transactions). The definition also includes: a felony offense that is committed with intent to defraud or that involves a conspiracy to defraud; a felony offense that is committed with intent to temporarily or permanently deprive a person of his or her property or that involves a conspiracy to temporarily or permanently deprive a person of his or her property; or a felony offense that involves or results in the commission of fraud or deceit upon a person or that involves a conspiracy to defraud or deceit upon a person.

² Section 501.160(2), F.S.

³ Section 501.160(1)(a), F.S.

⁴ Section 501.160(1)(b), F.S.

⁵ *Id.*

Penalties that may be assessed include a civil penalty of not more than \$1,000 per violation with an aggregate total not to exceed \$25,000 for any 24-hour period.⁶

Additionally, current law makes unlawful all unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.⁷ The civil penalty for willfully violating this section is a penalty of not more than \$10,000 for each violation and \$15,000 for each violation that victimizes a senior citizen or handicapped person.⁸

During 2004, the Florida Attorney General's Economic Crimes Division handled over 8,700 complaints as a result of the four hurricanes that struck the state. Thirteen lawsuits were filed in Florida courts alleging price gouging and Unfair and Deceptive Trade Practice violations. Of those thirteen, seven were against hotels, two against tree trimming services, three against generator sales, and one against a carpet cleaning and restoration service. Two of the thirteen cases have settled.

The Florida Department of Agriculture and Consumer Services' Division of Consumer Services, Division of Standards and Office of Agricultural Law Enforcement received and investigated many potential price gouging complaints following the 2004 hurricanes. The Division of Consumer Services received approximately 6,535 calls to its hotline and 3,034 complaints were investigated. The Division of Standards received 900 complaints and took enforcement action against 66 retail gasoline outlets and 21 terminals. The Office of Agricultural Law Enforcement has investigated 260 complaints and taken six actions.

HB 1675 creates section 501.161 which makes it unlawful for any person to engage in price gouging in the state. The term price gouging is defined to mean knowingly renting or selling or attempting to rent or sell, essential equipment, commodities, or accommodation during a state of emergency declared by the Governor for a unconscionable price that is 110 percent or more of the average price charged for such essential equipment, commodities or accommodation for the 30 days immediately preceding the declaration of a state of emergency, unless the increase is caused by actual costs incurred in connection with the essential equipment, commodities, or accommodation.

The term "essential equipment, commodities, or accommodation" is defined to mean any goods, services, materials, merchandise, supplies, equipment, resources, or other article of commerce and includes without limitation, food, water, ice, chemicals, petroleum products, and lumber necessary for consumption or use as a direct result of an emergency. The term also includes any temporary accommodation, such as a hotel, motel, other transient lodging facility, or other residential accommodation, sought by persons seeking shelter during the emergency.

The bill provides that the offense is a second degree misdemeanor, punishable by up to 60 days in county jail, if the offender receives less than \$300, or receives no consideration of any kind, for the essential equipment, commodities or accommodation. The offense is a first degree misdemeanor if the offender receives \$300 or more for the essential equipment, commodities or accommodation.

C. SECTION DIRECTORY:

Section 1. Amends s. 775.0844, F.S. relating to the White Collar Crime Protection Act to amend definition to include Medicaid provider fraud.

Section 2. Amends s. 921.0022, F.S. to make corresponding changes to offense severity ranking chart of Criminal Punishment Code.

Section 3. Creates s. 501.161, F.S. relating to price gouging during a state of emergency.

⁶ Section 501.164, F.S.

⁷ Section 501.204, F.S.

⁸ Section 501.2075, F.S.

Section 4. Provides effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference has not met to consider the prison bed impact of this bill on the Department of Corrections. During the 2004 session, the conference determined that HB 1525 which contained provisions similar to those contained in sections 1 and 2 of this bill would have an insignificant impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill creates two new criminal offenses related to price gouging. This may have an indeterminate county jail bed impact.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill creates a criminal offense of price gouging that appears to be broader than the current civil provision. This bill could have an impact on businesses that will not be permitted to sell their products during a state of emergency in excess of a price that is related to the price for which the product was sold during the 30 days preceding the state of emergency.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

This bill may be challenged as violating Florida's constitutional single subject requirement which states that "[e]very law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." Art. III, § 6, Fla. Const. In Franklin v. State, 887 So.2d 1063 (Fla. 2004), the Florida Supreme Court stated that "the single subject of an act is derived from the short title, i.e. the language immediately following the customary phrase "an act relating to" and preceding the indexing of the act's provisions".

The first two sections of the bill deal with the offense of aggravated white collar crime and the corresponding sentencing provisions. The third section of the bill deals with price gouging during a state of emergency. It is not clear that this relates to "fraud", the subject of the bill.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill defines price gouging as selling or renting essential equipment, commodities or accommodation for an "unconscionable price that is 110 percent or more of the average price" changed for the essential equipment, commodities or accommodation for the 30 days immediately preceding the declaration of the state of emergency. It is not clear from this provision whether the price must be unconscionable (by a standard not defined in the bill) *and* be 110 percent of the previous price or whether the fact that the price charged is 110 percent or more of the previous price alone means that it is unconscionable and therefore price gouging.

Further, the bill does not indicate whether the average price charged for the essential equipment, commodities or accommodation refers to the average price charged by the person being charged with the offense or whether the price charged by the offender should be measured against another standard such as to the average price previously charged for the essential equipment, commodities or accommodation by other businesses in the area.

The bill makes price gouging a second degree misdemeanor if the offender "receives less than \$300" or receives no consideration of any kind and a first degree misdemeanor if the offender receives \$300 or more. In order to constitute price gouging, the price must be at least 110 of the previous price. It is not clear whether the \$300 should be measured by the compensation the seller receives in the transaction or whether it should be measured by how much the seller receives in excess of 110 percent of the previous price. Further, the bill could be clarified to indicate whether the funds received during the state of emergency as a result of price gouging should be aggregated to determine whether the \$300 threshold is met or whether each transaction is a separate offense of price gouging.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES